

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

JERRY WAYNE SMITH

Debtor

No. 95-14302

Chapter 13

MEMORANDUM AND ORDER

This chapter 13 case is presently before the court upon the motion by Archie Fletcher ("Fletcher") for relief from the automatic stay imposed by 11 U.S.C. §362, and upon the objections by Fletcher and the standing chapter 13 trustee ("Trustee") to confirmation of the modified plan proposed by the debtor, Jerry Wayne Smith ("Debtor").

The Debtor filed his petition on October 16, 1995. The petition did not name Fletcher as a creditor of the Debtor. By order filed December 20, 1995, the chapter 13 plan of Debtor was confirmed subject to a *de novo* hearing on the objection by Tennessee Credit Corporation scheduled for February 5, 1996. No other creditor objected to confirmation. The *de novo* hearing was rescheduled to February 20, 1996, due to inclement weather on the scheduled date. In the meantime, Bank America Housing Services ("Bank America") filed a motion for relief from the stay. Also, the Trustee filed a motion to dismiss, and Fletcher filed a motion to lift the stay. The latter two motions were not filed sufficiently in advance of February 20, 1996, for them to be scheduled for hearing on that date. The motion by Bank America for relief from the stay was resolved by the Debtor and Bank America announcing that the Debtor would be filing a modified plan for

consideration. With respect to the *de novo* hearing, the court determined that the case was to be continued under the terms and conditions of the confirmed plan.

The motion for relief from the stay of Fletcher was scheduled for hearing on March 4, 1996. The motion to dismiss filed by the Trustee had been scheduled for hearing on March 7, 1996, but the motion was withdrawn because that date was not a regular Winchester docket day. The motion to dismiss was not refiled.

Debtor filed a modified plan on February 26, 1996. On that same day, Debtor amended his statements to add Fletcher as a creditor for past due lease payments. By agreement, Fletcher's motion for relief from the stay was continued to March 18 because a meeting with the Trustee on the modified plan had been scheduled for March 11. The meeting with the Trustee was held as scheduled, and both the Trustee and Fletcher objected to confirmation. The confirmation hearing and the hearing on Fletcher's motion for relief from the stay were continued by agreement to April 1, 1996.

The parties have filed briefs with respect to Fletcher's motion for relief from the stay. The thrust of Fletcher's argument for relief from the stay is that the lease agreement between Fletcher and Debtor has been terminated by state court action. If a lease agreement has been terminated pre-petition, the lessee/debtor may not cure the default and reinstitute the lease. *In re Memphis-Friday's Associates*, 88 B.R. 830 (Bankr. W.D. Tenn. 1988) (applying Tennessee law with respect to a commercial lease); *but see Gatlinburg Housing Authority v. Talley (In re Talley)*, 69 B.R. 219 (Bankr. M.D. Tenn. 1986) (Applying Tennessee law, a chapter 13 debtor can cure the default and rehabilitate a

residential lease until the tenant has been dispossessed by a writ of possession).

In this particular case, the state court action for unlawful detainer was not commenced until after the petition had been filed. Why the Debtor did not list Fletcher as a creditor or at least invoke the protection of the bankruptcy laws at his first opportunity in state court is not explained in the record. Such lack of action could reflect on the good faith of the Debtor. See *In re Smith Corset Shops*, 696 F.2d 971 (1st Cir. 1982). While lack of good faith may prevent confirmation of the Debtor's modified plan, it has no effect on the motion for relief from the stay.

The important factor insofar as Fletcher's motion for relief from the stay is concerned is whether the writ of possession issued by the state court post-petition is effective. The Sixth Circuit has declared actions taken in violation of the automatic stay to be voidable. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993). The courts may retroactively lift the stay (annul it) in two situations. First, the debtor failed to notify the creditor of the stay for the purpose of raising it later to avoid a result in the creditor's favor. Second, the debtor unreasonably withheld notice, and the creditor changed its position so that it will be unduly prejudiced by allowing the debtor to use the stay as a defense. *Id.* at 911. It does not appear that either ground for annulling the stay is present in this case. Thus, the writ of possession issued by the state court post-petition is not binding upon this court.

Accordingly, Fletcher's motion for relief from the stay will be denied subject

to review in connection with consideration of the Debtor's modified plan which will be scheduled for hearing on June 3, 1996.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

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JERRY WAYNE SMITH

Debtor

ORDER

In accordance with the Memorandum Opinion entered by the court,

It is ORDERED that the motion for relief from the automatic stay filed by Archie Fletcher is denied subject to review in connection with consideration of the debtor's modified plan;

It is further ORDERED that the objection to confirmation filed by Archie Fletcher to the debtor's modified plan is scheduled to be heard on June 3, 1996, at 9:30 a.m., in the Bankruptcy Courtroom, U.S. Post Office and Courthouse, Winchester, Tennessee.

ENTER:

BY THE COURT

entered 5/29/1996

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE